

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
ANDRE THOMAS, :  
Plaintiff, :  
:-----  
-v- : 05 Civ. 3010 (DLC)  
:-----  
BRIAN FISCHER, :  
Superintendent of Sing Sing :  
Correctional Facility, :  
Defendant. :  
-----X

DENISE COTE, District Judge:

On July 5, 2007, Andre Thomas' ("Thomas") petition for a writ of habeas corpus was denied. In a motion dated July 19, and filed on July 26, Thomas applies pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the July 5 decision. The motion is denied.

Thomas contends that New York law permits the Court of Appeals to consider a federal claim not argued before the Appellate Division that had been preserved at trial. As a result, he contends that his legal sufficiency claim was preserved for federal habeas review when it was raised before the Court of Appeals even though it had not been raised before the Appellate Division. As the defendant points out in its opposition of July 27, raising an argument in an application for review by the New York Court of Appeals does not preserve the

claim for federal habeas review unless the claim was also presented to the Appellate Division. See St. Helen v. Senkowski, 374 F.3d 181, 183 (2d Cir. 2004). Accordingly, it is hereby

ORDERED that the Rule 60(b) motion filed on July 26, 2007, is denied.

SO ORDERED:

Dated: New York, New York  
August 20, 2007

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*Denise Cote*  
DENISE COTE

United States District Judge

COPIES SENT TO:

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